

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1204

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1204

Bp/s

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

V.

NEIL A. SCARFO
DEFENDANT-APPELLANT

On Appeal From The United States District Court
For the District of Connecticut

BRIEF FOR DEFENDANT-APPELLANT

NEIL A. SCARFO



BRIAN J. FARRELL
MANTZARIS & FARRELL
34 ACADEMY STREET
WALLINGFORD, CONNECTICUT

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RULE OF EVIDENCE INVOLVED

Federal Rule of Evidence 403

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE,
CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

* * * * *

STATEMENT OF THE ISSUES

1. WHETHER THE TRIAL COURT IMPROPERLY ADMITTED GOVERNMENT EXHIBITS 4-B AND 4-C AND ATTENDANT TESTIMONY FOR THE PURPOSE OF SHOWING IMPROPER DOCUMENT PREPARATION BY NEIL SCARFO.
2. WHETHER THE TRIAL COURT IMPROPERLY ADMITTED TESTIMONY BY LOUIS BUONANNI AS TO GAMBLING WAGERS MADE BY NEIL SCARFO.
3. WHETHER THE EVIDENCE IS SUFFICIENT TO SUSTAIN A CONVICTION FOR EMBEZZLEMENT.

STATEMENT OF THE CASE

This direct criminal appeal arises from a judgment of sentence imposed April 4, 1977 after a seven day jury trial in the District of Connecticut, United States District Judge Jon O. Newman presiding. App. 2-3. Neil Allen Scarfo, the appellant, was convicted of violating 18 U.S.C. § 656 (one count) by embezzling money from a federally insured bank where he was employed as a teller. App. 5. The trial judge denied appellants' motion for judgment of acquittal at the close of the evidence. App. Tr. 890-895. Timely notice of appeal was filed. App. 6. Execution of the sentence has been stayed pending appeal. App. 4.

STATEMENT OF FACTS

On September 7, 1976 the defendant, employed by the Home Bank and Trust Company, Meriden, Connecticut as a teller at its main branch at 400 East Main Street, Meriden, did not return from lunch.

It was subsequently determined that he had been in an automobile accident and would not be returning to work that day.

His drawer and vault were then counted by other bank personnel and it was found to be short by \$15,000.45.

The defendant was contacted later in the evening of the seventh but could shed no light on the shortage.

Bank personnel re-counted the money, ran checks of completed work on the evening of the seventh and had the auditor audit the entire branch on the morning of the eighth. It was determined that the bank was short \$15,000.45. The money has not been found.

Suspicion centered on the defendant as the drawer and vault were his responsibility. The defendant testified at the trial and denied taking any money or having any knowledge of where the money went.

The Prosecution Case

The Home Bank and Trust Company is insured by the Federal Government (sic) Insurance Corporation. Tr. 93. The defendant Neil Scarfo was employed as a teller at the main office branch of said bank located at 400 East Main Street, Meriden, Connecticut. Tr. 278. In addition to being a teller, he was also the "vault teller" from sometime in May, 1976 until September 7, 1976. Tr. 278. In his capacity as vault teller he took in excess money from other tellers and distributed money to the other tellers when they ran short. He also bought and sold excess or needed money from the branch to Hartford National Bank, which shipments of money were picked up or delivered by Wells Fargo. Tr. 241, 353, 354, 372, 414.

September 7, 1976 was a Tuesday. Monday, September 6, 1976 was Labor Day and the bank was closed. Tr. 39.

The defendant did not return from lunch on September 7, 1976 and it was ascertained that he was in the hospital. Tr. 394.

Mr. Scarfo's drawer was counted by Donald E. McKnight and Virginia Spear who found a shortage of \$15,000.45 after counting the drawer at Mr. Scarfo's station and the vault. Tr. 168, 214, 216. After dinner, the bank President, Mr. Kellogg, Mr. Lyons, Mr. McKnight and Miss. Spear returned to the bank to check the teller tapes and the proof department in an effort to find any excess. Tr. 170, 171. On September 8, 1976 a

complete count of the entire branch was done by Mr. Azzola, the auditor, verifying the shortage of \$15,000.45. Tr. 70, 250.

On the evening of September 7, 1976 the defendant was contacted but could not explain the shortage. Tr. 48, 79. The defendant at the request of Mr. Kellogg came to the bank on the afternoon of September 8, 1976 and was interviewed by Mr. Kellogg and Mr. Lyons. Tr. 52, 81. Mr. Scarfo was bruised and had difficulty speaking, he had no explanation of the shortage and in response to a question stated he had no outside problem. Tr. 52, 53, 81, 82. Mr. Scarfo was suspended. Tr. 82.

On September 13, 1976 the defendant was interviewed by Matthew Stankiewicz, a Special Agent with the F.B.I. at the Meriden Police Department concerning the shortage at the bank. Tr. 514. The defendant signed an advice of rights form and a consent form to search his vehicle. Tr. 515, 516.

The defendant denied taking the money, stated that other people in the bank could get access to his vault or drawer and that he did some gambling. Tr. 520, 521, 522. The defendant's motor vehicle was searched at Meriden Auto Body, by Agent Stankiewicz, who found a number of dogtrack tickets, off-track betting (O.T.B.) tickets, football pool forecasts and handwritten slips containing teams and amounts. Tr. 526, 527. Mr. Scarfo stated that he bet at the dogtrack and placed bets with a bookie named Albert Buonanni, a brother of Louis Buonanni. Tr. 527. Mr. Scarfo stated he was able to bet because he had money from

winnings and that he was not in any trouble. Tr. 528.

The auditor, Mr. Azzola, prepared a "recap sheet" which was Government Exhibit 5 from the vault tellers' daily balance sheet and vault cash sheets. Tr. 236, 237, 238, 239, 240. The recap sheet consisted of columns showing cash drawer; representing actual cash plus certain other items in the tellers drawer; vault, representing the total cash in the vault; total cash, representing the total of the first two columns; cash in and cash out taken from the vault tellers' balance sheet; the next columns were teller transfers in and out; the next column is miscellaneous insurance; next is large bills in drawers representing the 50 and 100 dollar bills the defendant kept in the two drawers at his station; the last two columns represent large bills sold to vault and large bills purchased from the vault. Tr. 239-244. Mr. Azzola, Mr. Stewart, Mrs. Knight and Mrs. Douglas testified from this recap sheet concerning the propensity of the defendant to keep in his drawer an amount in excess of the policy limits for drawer cash set by the bank. Tr. 240, 339, 418, 605. The same witnesses were asked and gave their opinion that the level of 50 and 100 dollar bills kept by the defendant was higher than necessary, (E.g., Tr. 343, 419, 607.) and was particularly high over the weekend of August 20, to 23, 1976 and September 3 to 7, 1976. Tr. 435, 438, 613, 614.

The governments' theory of the case presented primarily through Mrs. Knight and Mrs. Douglas was that the high numbers

of large bills were in fact so high as to justify the inference that the bills were not in the drawer, especially over the week-ends of August 20-23, 1976 and September 3-7, 1976. E.g., Tr. 425, 426. The teller transfer tapes for those days were analyzed in the government case in chief and in rebuttal and the witnesses testified that they could not find transactions to allow for the payment of the large bills to customers. E.g., Tr. 428, 429, 438, 439.

The government offered two self-styled bookmakers, Albert and Louis Buonanni who testified after an agreement with the government for immunity concerning their gambling activities, (Tr. 554, 555, 558.) that they had taken bets from Neil Scarfo on baseball and basketball games. E.g., Tr. 539, 563. Albert Buonanni testified that the defendant bet "small from January through March of 1976 ie ten times, fifteen times (E.g., 10 times requires \$55.00 bet to win \$50.00.) Tr. 536. The defendant did not bet with Albert Buonanni after May of 1976 at which time the defendant was \$500.00 to the good having won \$2,000.00 in May. Tr. 551.

Louis Buonanni testified that he took bets from the defendant from July through September 10, 1976, the Friday after the appellant's accident. Tr. 563, 568. The appellant and Buonanni settled their weekly bets on Wednesday or Thursday of each week at Walgreen's of My Dad's Steak House. Tr. 568, 571, 572. Louis Buonanni testified that the defendant bet

every day during August and had losses of \$2,200.00 on two separate weeks in August and \$1,700.00 in another week. Tr. 567. The defendant won \$500.00, \$400.00 "some small winners" and he received \$900.00 on September 13, 1976 on a bet made over the weekend of September 3, 1976. Tr. 573, 589. The winnings and losses were paid and collected in \$100.00 bills. Tr. 575, 593.

The government elicited testimony from several witnesses concerning two vault sheets for August 31, 1976. (Government Exhibits 4-B and 4-C) The vault sheet referred to as 4-B was completely filled in and the sheet entitled 4-C was only partially filled in. Tr. 319. The two sheets had been continually in the control and custody of the bank. Tr. 318. The difference in the totals on the two sheets was \$3,000.00 and \$5,000.00. Tr. 338. None of the witnesses for the government had any explanation for the partially filled in sheet other than that it was just another sheet. Tr. 338, 424, 609.

Mr. McKnight, Mr. Cowing and others testified that the only way access could be gained to the appellant's drawer in order to open it was by obtaining an alternate set of keys from a safety deposit box in the vault which contained an alternate key to each teller's station. Tr. 96, 97, 133, 152, 166. The safe deposit box could only be opened by using a special attendant key and another key, the attendant key being held by the safe-deposit attendant and Mrs. Douglas and Mr. Stewart each had a copy of the second necessary key. Tr. 96.

Mr. Cowing further testified that to get into the safe-deposit area of the vault required having the safe-deposit attendant open the day gate. Tr. 97, 98. To gain access from the safe-deposit area to the cash area or inner vault requires another key which is kept by the supervising teller or in her absence the alternate supervisory teller. Tr. 116, 117. The tellers themselves have keys to their own cash drawers and a combination to the locker where the cash drawers are stored when not in use. Tr. 113, 117.

The Defense

The appellant consistently maintained his innocence from the first time he was questioned about the shortage to his sentencing. He cooperated fully with the government. Tr. 520, 530. He voluntarily testified before two Federal Grand Juries. Tr. 722. The appellant maintained that he could offer no explanation other than the possibility of some other person taking the money from his drawer. He testified that on the critical days of September 3 and 7, 1976, the appellant was away from his station to go to supper at approximately 4:30 or 5:00 P.M. for one-half hour. Tr. 653, 654; to relieve the drive-in teller from six to seven o'clock on September 3, 1976, (Tr. 655.) and at various times while doing other work on the morning of the seventh. Tr. 657, 658.

On cross-examination of Kenneth Cowing, head of security

and a government witness, it was elicited that anyone who had a teller key could have a copy made, (Tr. 114.) and that when tellers change stations the locks are not changed. Tr. 115. The purpose for having a key-system teller drawer is to protect the teller as he is to have sole access to the cash he is responsible for. Tr. 99, 118. In the event that there are more keys the protection of the individual teller is reduced. Tr. 119.

September 3, 1976 was an unusually busy day at the bank as there was a Bicentennial celebration and there was coffee offered in the lobby. Tr. 137, 651.

When returning from lunch on September 7, 1976 the appellant was in an accident with his automobile and was taken to the Meriden-Wallingford Hospital by ambulance. Tr. 661. He was treated in the emergency room, received stitches in his lip, was examined and had x-rays. Tr. 752, 753. Upon arriving he requested the emergency room to call the bank and his aunt so as not to disturb his mother. Tr. 662, 752. The appellant spent six hours at the hospital, he received no medication other than novacaine, (Tr. 752.) and was physically able to leave much sooner than he did. Tr. 666, 753.

Upon leaving the hospital, the appellant stopped by the garage to see his car; the O.T.B. tickets and other items were visible in the automobile but the defendant took nothing from the car, (Tr. 664, 665.) despite the suggestion that he do so. Tr. 880.

The appellant willingly went to the bank the next afternoon when Mr. Cowing picked him up as he had no car. Tr. 666. Mr. Kellogg and Mr. Lyons questioned him about the shortage but did not offer to allow him to check his drawer or tapes. Tr. 668.

The defendant was employed as a teller with the bank from September 1975 to September 7, 1976. Tr. 636. He was trained to be a teller for two weeks at the Rocky Hill Branch and became a teller at the main branch in April or May of 1976. Tr. 636, 638.

The appellant had a cash transaction error of \$288.00 on May 20, 1976 and on July 1, 1976 had a shortage of \$699.75. Tr. 87, 639. No action was ever taken on these errors until September 2, 1976 when Mr. Lyons, Bank Vice President, spoke to him about it and put him on probation, warning him that any further errors of over \$100.00 would mean termination. Tr. 85, 351, 352, 646. Prior to his conversation, Mr. Stewart, the Assistant Manager of the main branch and Mrs. Douglas, the Manager, had counted all of the money in the appellants' vault and found it to be correct. Tr. 283, 611, 648. Stewart and Douglas testified that the vault count was done on September 3, 1976. Tr. 283, 611. Stewart and Douglas also testified that they made the vault count to check on the prior shortages. Tr. 351, 611. They did not count the cash in the drawer although they could have done so. Tr. 355, 621, 622.

Mr. Scarfo maintained that he kept large sums of money in his second or reserve drawer so that he could rapidly serve other tellers. Tr. 641, 642, 673, 674. He used this system to

obtain more speed in handling the vault which was a desired trait for the job. Tr. 279, 641.

He kept large amounts of large bills onhand because he used them in paying out money to customers. Tr. 693.

The appellant consistently maintained that he sold large bills to other tellers and no teller transfer slips were used. Tr. 745. The appellant testified concerning the weekend concentrated on by the prosecutor as having unusually high dealings in large bills by the appellant; that he paid large amounts out through his window and at the invitation of the prosecutor, pointed out on the teller tapes for those days the transactions where large bills could have gone out. Tr. 765, 766, 767, 771. The appellant further maintained that it was his practice to give out large bills, (Tr. 693, 694.), and although he encountered some resistance, the majority of customers accepted them. Tr. 770, 771, 773.

During the period of time mentioned in the indictment, Mr. Scarfo earned \$111.00 per week gross and \$88.00 per week take home in his job as teller. Tr. 603, 694. In addition he had an income of \$43.75 quarterly from his job as auditor for the Eagles Club, and he received some money from doing odd jobs with his brother. Tr. 695.

He lived at home and had no expenses other than a car payment of \$70.00 per month. Tr. 695, 696. He would occasionally give his parents money to pay bills. Tr. 695.

Mr. Scarfo stated that he began gambling in 1974; he

bet with the Buonanni's, alternating between Albert and Louis. Tr. 697, 698. He bet during the last week in July and all through August, 1976 during which period he stated that he won a total of \$5,000.00 and lost \$2,225.00 for a net win of \$2,775.00. Tr. 854. The last nine hundred dollars of which was paid the Saturday before September 7, 1976. Tr. 702, 703, 704. Mr. Scarfo also bet at O.T.B. and the Plainfield dogtrack where he also won. Tr. 707, 864.

The appellant stated that the reason for their being in existence what appeared to be two vault sheets for the same day (Government Exhibit 4B and 4C) was that he had changed his mind about the sale to Wells Fargo and therefore never used the empty sheet (4-C) and it was just a worksheet that he didn't bother to throw away. Tr. 681, 682, 683, 688, 756, 760, 761.

Paula Stevens, a receptionist and secretary, testified for the government. Tr. 128-135. On cross-examination she stated that she regularly went in and out of the vault by herself by obtaining the keys necessary from Mr. Stewart, Mrs. Douglas, Neil Scarfo, (Tr. 139.) and by going into a drawer in a desk. Tr. 139. Mrs. Telford, a part-time teller, who came into work at an odd hour testified that she was able to obtain a key from Neil Scarfo or Mr. McKnight and go into the inner vault to obtain her cash drawer. Tr. 410. Mrs. Mae Natlo, another teller testified that she came in

at an off-hour (11 A.M.) and then procured a key and went into the inner vault alone to obtain her cash drawer. Tr. 471.

Events at Trial

Documentary evidence was offered prior to the taking of testimony. Tr. 2-34. The prosecutor offered "a vault cash sheet for August 31, 1976, with full figures on it, and a relatively empty vault cash sheet for August 31, 1976 with different figures on it". Tr. 11. They were marked for identification only upon objection by the defense. Tr. 11-12.

Subsequently, the prosecutor, through its witness, John Stewart, attempted to introduce Government 4-B and 4-C and the defense renewed its objection. App. Tr. 318-319. The prosecution stated that the purpose of the offer was to show evidence of improper handling by Mr. Scarfo of his records to support an inference that the documents related to the covering up of a transaction. App. Tr. 319. The documents were admitted. App. Tr. 319, 320.

During the direct examination of Louis Buonnani the prosecution showed him certain slips of paper already in evidence having been taken from Mr. Scarfo's automobile. Tr. 526. The defense objected to the testimony. App. Tr. 579-580. The objection was overruled on the grounds that it was not remote and it was relevant. App. Tr. 580-581. The over-all question of the relevancy of the testimony of their witness had been thoroughly discussed in a motion made previously. App. Tr. 308-314.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY ADMITTED GOVERNMENT EXHIBITS 4-B and 4-C TO SHOW IMPROPER DOCUMENT PREPARATION.

There was substantial evidence offered by the government to the effect that the shortage of \$15,000.45 was missing from the teller cash drawer and not from the vault. This was the testimony of Mr. McKnight, (Tr. 169.) Mrs. Spear, (Tr. 216) and Mr. Azzola. Tr. 251. These were the people who counted the money on September 7, 1976 and were introduced by the government for that purpose. The government is not bound by every witness it calls. U.S. v. Polizzi, 500 F.2d 856 (9th Cir. 1974), however, in this instance the government has introduced evidence contrary to the inference which it stated it wanted the jury to draw. This is not permissible. Rodgers v. U.S., 402 F.2d 830, 833 (9th Cir. 1968).

While it is true that the Rodgers case does not purport to state a general rule, its reasoning is well adopted to this case since the evidence here is from the governments own witnesses, the documents introduced were taken by the government directly from the Home Bank, which had had custody of them, and there was no other evidence of any improper document handling. U.S. vs. Payne, 467 F.2d 828,831 (9th Cir. 1972). The government used the documents throughout the trial always attempting to take advantage of the same inference, although the witnesses generally stated only that they had no idea why

the partially blank sheet was there. E.g., Tr. 368, 424. Nowhere was any evidence given to show any transaction cover-up in the handling of Mr. Scarfo's vault. The only attempted evidence was that given by Mrs. Knight who stated that she on one occasion (the time was not related except to the extent that it was prior to September 3, 1976, Tr. 418), she went into the vault with Mr. Stewart. We do know that Mr Knight did not go near the vault on August 31, 1976 because she was on vacation. Tr. 424. Unfortunately, even though Mr. Stewart denied going into the vault with Mrs. Knight, (Tr. 367), the offending documents were already in evidence. The simple truth is that although the government stated that it would produce evidence to support the admission of the documents, it failed to do so and the admissions were error. U.S. v. Falley, 489 F.2d 33, 37 (2d Cir. 1973).

This particular evidence was of extreme importance to the governments case and exceedingly prejudiced to the defense. It was the only evidence showing any irregularity in Mr. Scarfo's record keeping and asked the jury to infer that since he falsified here he would falsify elsewhere. The government was not entitled to the benefit of that inference and the possibility of diverting the jury to the belief that Mr. Scarfo mishandled his funds was too great to allow the documents into evidence. Lyda v. United States, 321 F2d. 788 796 (9th Cir. 1963). The defendant explained

the second sheet as nothing more than a trial balance sheet concerning a money shipment to Wells Fargo. Tr. 688. Even if Mr. Scarfo had no explanation the government had not carried "its heavy burden of proof". Rodgers v. United States, supra at 834.

It must be noted that the offer of proof and the intended inference were stated in the presence of the jury. App. Tr. 319. Thus, the question of relevancy versus prejudicial jury impact should put an even greater burden upon the prosecution to substantiate its proof. In this instance the prejudice outweighed the relevance under the reasoning as set forth in United States v. Ravich, 1196, 1204 (2d. Cir. 1970).

II. THE TRIAL COURT IMPROPERLY ADMITTED TESTIMONY BY LOUIS BUONANNI CONCERNING GAMBLING WAGERS BY NEIL SCARFO

Louis Buonanni, testifying for the government was handed slips of paper which had previously been admitted into evidence as the product of a search by consent. Tr. 526, 577. Agent Stankiewicz had stated that he could not decipher them. The defense objected to testimony from Mr. Buonanni concerning the slips, as he himself stated that he'd never seen them before nor could he tell where they were from. App. Tr. 579. The trial judge overruled the objection on the grounds that it was not remote and that it was relevant. App. Tr. 580.

Mr. Buonanni was allowed to testify after being given immunity, concerning Mr. Scarfo's gambling losses to him. Tr. 555 et. seq. The relevancy of his testimony when it was admitted was based on the general rule that possession of large sums of money is relevant testimony in cases concerning crimes where financial gain is a natural result. Hansberry v. United States, 295 F.2d 800 (9th Cir. 1962) 91 A.L.R. 2d. 1046. It is also true, however, that in all cases where the possession of money is considered relevant, there exists a balancing of relevancy with the threat of unfair prejudice upon the jury. Duvall vs. United States, 94 F. 2d 911 (3rd Cir. 1938), United States v. Ravich, supra, 421 F.2d at 1204. Also see the discussion in Widmore Sec. 154.

There had been evidence that the defendant gambled

with Buonanni or his brother with whom he was in partnership for about a year and a half and substantially before the period of the indictment. Tr. 536, 561. The only testimony of losses from gambling by Mr. Scarfo was concerning August, 1976. Tr. 566, 567. Mr. Buonanni stated that he had no idea what dates the games listed on the slips in the defendants' exhibit took place. There was too great a chance of the jury connecting the testimony of the August losses with the testimony from the slips. It is well settled that the trial judge has discretion in weighing the probative value of evidence against its tendency to create unfair prejudice. Hamling v. United States, 418 U.S. 87, 127, 94 S.Ct. 2887 41 L.Ed. 2d 590 1974). In this instance, however, the trial judge should not have permitted the testimony after the witness stated he did not know, since the evidence the witness was called for was to show unexplained money in the defendants hands and not to expand the case into one of gambling. United States v. Ravich supra, United States v. Falley supra at 489 F.2d 40. That the result was in fact to lead to excess gambling evidence beyond motive can be seen from the judges' admonition to the prosecution. App. Tr. 804-805. The opinion of the Falley case points out that once prejudicial testimony has come in mere instruction by the court cannot outweigh the prejudice.

The question is basically one concerned with Fed. R.

Evid. 403 ^{*/} In this case it is submitted the prejudicial impact of this evidence "substantially outweighs" its probative value and should have been excluded. United States v. Robinson, No. 76-1153 (2d Cir. Nov. 1, 1976)

^{*/} for text of rule see page iv.

III. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN A CONVICTION FOR EMBEZZLEMENT.

The governments case against Neil Scarfo consisted wholly of circumstantial evidence which when distilled to its elements consisted of the following.

The defendant kept more money in his cash drawer than was permitted by the policy of the bank. A substantial portion of the excess money was kept in large bills. The defendant gambled and he had paid losses to his bookies at or near the time of the money shortage being discovered in his drawer. The money was never found and the defendant did not explain why the money should be missing.

The defendant at the end of all of the evidence made a motion for judgment of acquittal in accordance with Fed. R. Crim. P. 29(a). Unless there was "relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt that the accused is guilty" American Tobacco Co. v. United States, 328 U.S. 781, 787, 66 S.Ct. 1125, 1128 90 L.Ed. 1575 1946. United States v. Glasser, 443, F.2d 994 (2d. Cir.) cert. denied 404 U.S. 854, 92 S.Ct. 96 30 L.Ed. 2d 95 (1971), the motion should be granted. While there is no question but that circumstantial evidence is equal in sufficiency to direct evidence it is also clear that in order for the evidence to be acceptable it must first be determined that a jury could rationally and logically infer the ultimate facts urged by the

government to be found from the basic facts presented by the government. United States v. Bowles, 428 F.2d 592, 597 (2d. Cir. 1970). The government first set out to show that Mr. Scarfo had sole possession of and access to his drawer, though primary witness in this regard, Kenneth Cowing, the security officer admitted that it was possible to duplicate keys and that the lock was not changed when tellers changed cash drawers. Aside from the vault sheets (Govt. 4-B and 4-C) previously discussed there was no evidence of any irregularity in any of Mr. Scarfo's records. It was also admitted by John Stewart and Lorraine Douglas, Mr. Scarfo's immediate superiors, that they could count his money at any time, and they could have looked at his balance sheet for each day at any time. Tr. 363, 622. Mr. Scarfo filed his daily balance sheets during each of the days noted in the indictment. In the case of United States v. Currier, 454 F.2d 835 (1st Cir. 1972), the appellate court rejected similar arguments made on behalf of Mrs. Currier concerning access and record keeping, but in that case there was solid evidence that even if someone else had gone into Mrs. Currier's work station she would have had to have known about it because she had sole responsibility for federal deposits. In addition there was evidence of erased and changed entries in defendants' handwriting. In this case there is no evidence whatsoever of any false entry on any of the sheets relied on by the prosecution that related to the shortage. It was further adduced as mentioned previously

that Mr. Scarfo's vault, although the money was not missing from there was accessible to others. The fact that the vault was counted on September 2 or 3, 1976 and again on the 7th bolsters the already convincing evidence that any shortage had to be in the drawer.

The evidence offered by the defendant was in essence that he kept extra money in his drawer to aid in speeding the vault teller job, (Tr. 641.) that he was at times away from his drawer and that he had no further explanation other than theft by others.

There was testimony from several witnesses as previously set out that Mr. Scarfo kept far more \$100.00 and \$50.00 dollar bills than were usual and offered analyses of teller tapes over two different weekends (August 20-23, 1976) and September 3-7, 1976) are set out earlier to infer that the \$100.00 and \$50.00 dollar bills were taken for use over the weekend. It must be noted, however, that Louis Buonanni and the defendant both stated that payments of money took place on Wednesday or Thursday. Tr. 571, 706. The evidence offered by the government concerning the excess money in Mr. Scarfo's drawer and the excess large bills was highly repetitive, and consisted of opinion based on bank policy.

This opinion evidence culminated with the final analysis of the tapes done by the bank after Mr. Scarfo's opinion was given concerning the number of large bills paid out as evidenced

by the machine tapes. App. Government Exhibit 20 and 20A Tr. 887.

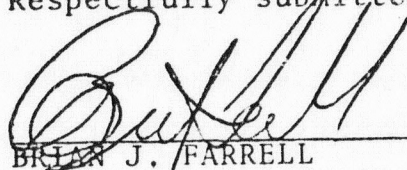
In an embezzlement case the government must specifically prove an intent to defraud the bank. United States v. Giordano 489 F.2d 327 (2d Cir. 1973). The purpose of this rule is to protect against a prosecution for an error. United States v. Scheper, 520 F.2d 1355 (4th Cir. 1975). Starting from that basis we must contrast the present case with cases such as United States v. Archambault, 441 F.2d. 281 (10th Cir. 1971) (customer of the defendant testified as to actual deposits made which the bank records did not reflect as having been entered); United States v. Bearden, 423 F.2d. 805 (5th Cir. 1970) (where there was actual documented evidence of misapplied funds); United States v. Currier, supra. In all of the above cases the appellate court found evidence of the conviction of the crime. There is no such evidence in this case. Contrast the above cases with United States v. Khandjian, 489 F.2d 133 (5th Cir. 1974) in which there was a shortage of \$320.00. A teller testified that she was certain that the defendant, the head teller (who apparently had duties concerning the vault similar to Mr. Scarfo's) had given her a packet of \$20's which was short by the \$320.00. Khandjian confessed but then recanted his confession but was convicted anyway. The appellate court reversed on the grounds that there was no independent evidence of guilt and a confession in the absence of guilt was not sufficient.

In this case, the government has attempted to use highly sensational motive evidence to convict Mr. Scarfo despite the fact that there is no actual constructive evidence of guilt.

CONCLUSION

The evidence put forth by the government was not sufficient to support a criminal conviction and the case should be remedied for entry of a judgment of not guilty. If this court finds the evidence adequate, however, it should consider the prejudicial impact of the trial courts' erroneous refusal to exclude the evidence noted herein and remand the case for a new trial.

Respectfully submitted,



BRIAN J. FARRELL
Attorney for Defendant-Appellant

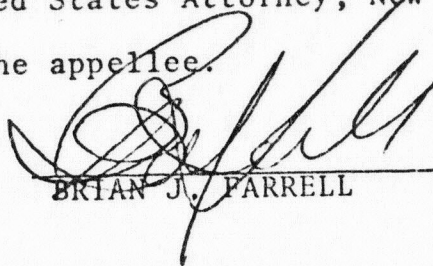
June 27, 1977

Brian J. Farrell
Mantzaris & Farrell
34 Academy Street
Wallingford, Connecticut 06492

CERTIFICATE OF SERVICE

On June 27, 1977, I hand delivered two copies of this brief and two copies of the Appendix in this case to Lawrence

M. Herrmann, Esq., Assistant United States Attorney, New
Haven, Connecticut, counsel for the appellee.



BRIAN J. FARRELL